Charles W. Prange, Inc. *and* Local 324, International Union of Operating Engineers, AFL-CIO. Case 7-CA-17970

May 29, 1981

DECISION AND ORDER

Upon a charge filed on July 7, 1980, by Local 324, International Union of Operating Engineers, AFL-CIO, herein called the Union, and duly served on Charles W. Prange, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on August 18, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that since October 14, 1968, and at all material times here, the Union has been recognized by Respondent as the designated exclusive collective-bargaining representative of Respondent's employees in the units described below. Such recognition is embodied in an agreement dated October 14, 1968. At all times since October 14, 1968, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the employees in the units described below for purposes of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

The complaint further alleges that since on or about January 5, 1980, Respondent has refused, and continues to date to refuse, to bargain with the Union as the exclusive bargaining representative of its employees in the aforementioned units. The complaint alleges that Respondent unilaterally modified a term of the existing collective-bargaining agreements[1] by ceasing to file reports and make payments to the Operating Engineers fringe benefit funds as the agreements require. It is further alleged that by such conduct Respondent is interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights and thereby violating Section 8(a)(1) of the Act.

Respondent did not file an answer to the complaint.

On February 13, 1980, counsel for the General Counsel filed with the Board a "Motion To Transfer Case to the Board and for Summary Judgment," with exhibits attached. On February 24, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint duly served on Respondent states that, unless an answer is filed by Respondent within 10 days of service of the complaint, "all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board."

The Motion for Summary Judgment states that on January 19, 1981, the Regional Attorney for Region 7 wrote to Respondent informing it that no answer had yet been filed and again advising Respondent of the answer-filing requirements. In that letter, the time for filing an answer to the complaint was extended until February 2, 1981. A copy of this letter is attached to the Motion for Summary Judgment as an exhibit and is uncontroverted by Respondent.

As indicated, no response to the Notice To Show Cause has been filed and it appears that Respondent was duly informed of the charges alleged in the complaint and has not filed an answer.

[1] The complaint specifies the agreement between Michigan Chapter Associated General Contractors of America, Inc., and International Union of Operating Engineers Local 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from May 1, 1978, through April 30, 1980, and from year to year thereafter, and the agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from June 1, 1977, through June 1, 1980, and, from year to year thereafter.

No good cause to the contrary having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and are found to be true. We shall, accordingly, grant the Motion for Summary Judgment. On the basis of the entire record the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Charles W. Prange, Inc., is, and has been at all material times herein, a Michigan corporation and has maintained its office and place of business at 5811 Kings Highway, Kalamazoo, Michigan. During the year ending December 31, 1979, which period is representative of its operations, Respondent, in the course and conduct of its business operations, had gross revenues exceeding $250,000 of which in excess of $50,000 resulted from the performance of services to customers who in turn either made sales directly to customers outside the State of Michigan in excess of $50,000 or purchased and caused to be transported to Michigan facilities directly from outside the State goods and supplies valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 324, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> (a) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between Michigan Chapter Associated General Contractors of America, Inc., and International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from May 1, 1978 through April 30, 1980, and from year to year thereafter.
>
> (b) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from June 1, 1977, to June 1, 1980, and from year to year thereafter.

2. The Union's majority status

Since on or about October 14, 1968, and at all material times, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the above-described units and the Union has been recognized as such representative by Respondent since said date. Such recognition has been embodied in an agreement dated October 14, 1968.

At all times since October 14, 1968, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the above-described units for purposes of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

B. *The Request To Bargain and Respondent's Refusal*

Since on or about January 5, 1980, and continuing at all times thereafter, Respondent has refused to bargain with the Union by unilaterally and without prior bargaining with the Union modifying a term of the existing collective-bargaining agreements by ceasing to file reports and make payments to the Operating Engineers fringe benefit funds as the agreements require.

Accordingly, we find that Respondent has, since January 5, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

We shall also order Respondent to make whole its employees by transmitting to the Operating Engineers fringe benefit funds all payments that were unilaterally withheld from the Operating Engineers fringe benefit funds;[2] to file the reports required by the aforesaid collective-bargaining agreements; and to comply otherwise with the terms and conditions of these agreements both retroactively and for the balance of any term for which that collective-bargaining agreement may be extended.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Charles W. Prange, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 324, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between Michigan Chapter Associated General Contractors of America, Inc., and International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from May 1, 1978 through April 30, 1980, and from year to year thereafter.
>
> (b) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from June 1, 1977, to June 1, 1980, and from year to year thereafter.

4. Since October 14, 1968, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 5, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate units, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By unilaterally ceasing to file reports and make payments to the Operating Engineers fringe benefit funds on and after January 5, 1980, without notice to the Union or affording the Union an opportunity to bargain on the matter, Respondent has violated, and is continuing to violate, Section 8(a)(5) and (1) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Charles W. Prange, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 324, International Union of Operating Engineers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate units:

> (a) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between Michigan Chapter Associated General Contractors of America, Inc., and International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from May 1, 1978 through

[2] See *Ogle Protection Service, Inc. and James L. Ogle*, 183 NLRB 682, 683 (1970). Under *Merryweather Optical Company*, 240 NLRB 1213 (1979), we leave the determination of interest, if any, to the compliance stage where any additional amounts will be determined by the individual provisions of the employees' benefit fund agreement.

April 30, 1980, and from year to year thereafter.

(b) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from June 1, 1977, to June 1, 1980, and from year to year thereafter.

(b) Failing to file reports, make payments to the Operating Engineers fringe benefit funds, or otherwise altering the terms and conditions of employment without notifying the Union or affording the Union an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate units with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," for Respondent's unlawful failure to make the required payments to the Operating Engineers fringe benefit funds, on and after January 5, 1980.

(c) File the reports as required by the aforesaid collective-bargaiing agreements.

(d) Post at its place of business in Kalamazoo, Michigan, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 324, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT fail to file reports required by existing collective-bargaining agreements.

WE WILL NOT withhold payments to the Operating Engineers fringe benefit funds, or otherwise alter the terms and conditions of employment without notifying the Union and affording the Union an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining units described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining units are:

(a) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between Michigan Chapter Associated General Contractors of America, Inc., and International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from May 1, 1978 through April 30, 1980, and from year to year thereafter.

(b) All operating engineer employees employed by Charles W. Prange, Inc. and encompassed in the collective bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324-A, 324-B, and 324-C, AFL-CIO, effective from

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

June 1, 1977, to June 1, 1980, and from year to year thereafter.

WE WILL make whole our employees by transmitting to the Operating Engineers fringe benefit funds all payments that were unlawfully withheld, plus interest if applicable.

WE WILL file the reports required by the existing collective-bargaining agreements.

CHARLES W. PRANGE, INC.